Submitted Dec. 16, 79.

Mr Justice Field

11-610

1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA BAR ASSOCIATION

No. ~~336~~ 107

THE AMERICAN BIBLE SOCIETY, PLAINTIFF IN ERROR,

vs.

JOHN A. GROVE, J. H. BROWNE, E. A. BROWNE, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 15, 1877.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA,
Western District of Missouri, set:

In the circuit court of the United States, in and for said district.

Be it remembered that heretofore, to wit, on the 13th day of November, A. D. 1875, it being in vacation of said circuit court of the United States, the following proceedings were entered of record, to wit:

Transcript from Macon Co. C. C. filed.

JOHN A. GROVE ET AL.
vs. } 602.
WILLIAM BOOKER, EX'R, ET AL.

This day a transcript of the record and proceedings in the above cause from the circuit court of Macon County, Missouri, is received by mail and duly filed.

Which said transcript so filed as aforesaid is in words and figures following, to wit:

Transcript.

STATE OF MISSOURI,
County of Macon, ss:

In the circuit court, Macon Co.

Be it remembered that on the 31st day of Jan'y, A. D. 1871, there was filed in the office of the clerk of said court within the county aforesaid a transcript of the record and proceedings in the Louisiana court of common pleas, within and for the county of Pike, in the State aforesaid, in the cause wherein John A. Grove, senior, et al. are plaintiffs, and William Booker et al. are defendants, which transcript is in words and figures as follows, to wit:

2 STATE OF MISSOURI,
County of Macon, ss:

Be it remembered that on the 6th day of March, A. D. 1868, there was filed in the office of the clerk of the Hannibal court of common pleas a petition in words and figures as follows, to wit:

JOHN A. GROVE, SEN., JOSHANA H. BROWN, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon, Sarah E. Dillon, John A. Grove, jr., Joseph A. Grove, A. Loretta Grove, Clara A. Grove, Zephalinda Grove, William Cowgill, Dorcas Cowgill, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William H. Hennegan & Mary H. Hennegan,
vs.
JOHN A. BOOKER, JOSEPH BOOKER, HIRAM E. Brown, Loretta Brown, William E. Booker, Sallie Booker, Edward Bradley, Mollie B. Pogue & Jennie W. Pogue, Rachel Johnson, Mary Dick, Jane Dick, Louisa Dick, Rachel A. Booker, Patience M. Booker, The Sunday School of the First Presbyterian Church, First Presbyterian Church of Hannibal, Missouri, Second Presbyterian Church of Hannibal, Missouri, The Methodist Episcopal Church South, & American Bible Society, def'ts.

In the Hannibal court of common pleas. In vacation.

3 Plaintiffs state that on the day of October, 1867, Jacob E. Grove, then a resident of the city of Hannibal, in the county of Marion, in the State of Missouri, died seized of an estate of inheritance in fee simple to a large quantity of real estate lying and being in the city of Hannibal, and also in the county of Marion, and in the State of Missouri, and the said Jacob E. Grove also died the owner of and possessed of a large amount of personal property & choses in action.

Plaintiffs further state that at the time of the death of the said Jacob E. Grove, he had neither wife nor children, and the plaintiffs and the defendants Joseph Booker, Loretta Brown, Hiram E. Brown, Dollie Booker, Edward Bradley, Mary Bradley, Richard A. Booker & Patience M. Booker are his legal heirs and representatives.

Plaintiffs further state that after the death of the said Jacob E. Grove, to wit, on the 19th day of October, A. D. 1867, an instrument in writing purporting to be the last will and testament of the said Jacob E. Grove, deceased, was produced before John R. Hibbert, clerk of the Hannibal probate court of Mason Township, in the county of Marion, in the State of Missouri, and upon the testimony of the subscribing witnesses to said instrument of writing taken by the said probate clerk, the said instrument of writing was on the day of , 1867,

4 admitted to probate as the will of the said Jacob E. Grove, dec'd.

A certified copy of the said instrument of writing and the order probating the same as the will of Jacob E. Grove, dec'd, is herewith filed and made a part of this petition.

Plaintiffs further state that by said pretended will the property, real and personal, of which the said Jacob E. Grove died seized and possessed was devised and bequeathed in the proportions therein set forth to the parties defendants in this cause & some of the plaintiffs. Plaintiffs now charge and aver that said instrument of writing so admitted to probate as aforesaid was not then and is not now the will and testament of the said Jacob E. Grove, dec'd.

Plaintiffs charge and aver that at the time the said instrument was signed and published by said Jacob E. Grove and attested by William P. Harrison and Benjamin Stevens, the said Jacob E. Grove was not of sound mind and disposing memory, and therefore incapable of making a will or disposing of his property.

Plaintiffs also charge and aver that one of said defendants, William Booker, who was appointed one of the executors of said pretended will, had and possessed an undue influence over the said Jacob E. Grove, and exercised said undue influence over the said Jacob E. Grove

5 in the making of said pretended will, and did influence him in the disposal of his property and effects.

Wherefore the plaintiffs aver that said instrument is not the last will and testament of the said Jacob E. Grove, dec'ed.

Plaintiffs further state that by said pretended will the said defendant William Booker and one Hugh H. Wardlow were appointed executors of said pretended will; that Hugh H. Wardlow qualified as executor of said pretended will and took upon themselves the execution of the same. That since they so qualified as executors the said Hugh H. Wardlow has departed this life, leaving the said William Booker as sole surviving executor of said pretended will. Plaintiffs therefore pray that the said order of the probate judge of said Hannibal probate court be set aside and for naught held.

Plaintiffs further pray that said instrument of writing purporting to

be the will of Jacob E. Grove, dec'd, be adjudged not to be the will of the said Jacob E. Grove, and that the same be set aside and for naught held, and grant to plaintiffs such other & proper relief as they may entitled to, &c.

THOS. L. ANDERSON,
Att'y for Pl'ffs.

Affidavit.

Thos. L. Anderson, for pl'ffs, makes oath and says that he believes that the defendants Hiram E. Brown, Loretta Brown, the First
6 Presbyterian Church of St. Clairsville, Ohio, and the American Bible Society are non-residents of this State.

THOS. L. ANDERSON.

Subscribed & sworn to before me this 3rd day of March, 1868.
H. H. WINCHELL, *Clk.*

Upon the filing of which said petition there was issued from the office of the clerk of said court an order of publication in words and figures as follows, to wit:

Order of publication.

STATE OF MISSOURI,
County of Marion, ss:

In the Hannibal court of common pleas. In vacation, March 6th, 1868.

JOHN A. GROVE, SEN., JOSHUA H. BROWN, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon, Sarah E. Dillon, John A. Grove, jun'r, Joseph A. Grove, A. Loretta Grove, Clara A. Grove, Zephalinda Grove, William Cowgill, Dorcas Cowgill, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William A. Hennigan, and Mary H. Hennigan,

vs.

WILLIAM BOOKER, JOSEPH BOOKER, HIRAM E. Brown, Loretta Brown, William E. Booker, Sallie Booker, Edward Bradley, Mollie B. Pogue, and Jennie W. Pogue, Rachel
7 Johnson, Mary Dick, Jane Dick, Laura Dick, Rachel A. Booker, The Sunday School of the 1st Presbyte i n Church of St. Clairsville, Ohio, The 1st Presbyterian Church of Hannibal, Missouri, The Methodist Episcopal Church South, and the American Bible Society, defendants.

Now at this day come the plaintiffs in the above-entitled cause by their attorney, Thomas L. Anderson, esqr., before the undersigned, clerk of the Hannibal court of common pleas, in vacation of court, and file their petition and affidavit, stating among other things that the above-named defendants, to wit, Hiram E. Brown, Loretta Brown, the First Presbyterian

Church of St. Clairsville, Ohio, and the American Bible Society, are non-residents of the State of Missouri. It is therefore ordered by the clerk aforesaid in vacation that publication be made, notifying them that an action has been commenced against them by petition in the Hannibal court of common pleas at Hannibal, in said county of Marion, the object and general nature of which is to obtain a decree setting aside the last will and testament of Jacob E. Grove, deceased, and unless they be and appear at the next term of the said court to be holden at the court-house in the city of Hannibal, in the county of Marion, and State of
8 Missouri, on the second Monday of June, 1868, and on or before the third day thereof (if the term shall so long continue, and if not, then before the end of the term), a decree will be rendered against them as prayed for in said petition. It is further ordered that a copy hereof be published in the North Missouri Courier, a newspaper published in said county of Marion, for four weeks successively, the last insertion to be at least four weeks before the commencement of the next term of said court.

JOHN V. HIBBERT,
Clerk.

Summons to Marion Co.

Summons issued March 10th, A. D. 1868, and directed to the sheriff of Marion County, Mo.

(The caption & body of summons not copied.)

Which said writ was afterwards returned with the following endorsement thereon, to wit:

Sh'ff's return.

Served the within summons by delivering a copy of the same, together with a certified copy of the herewith attached petition, to the within-named William Booker, and by delivering a copy of this writ to the within-named Rachel Johnson, Mary Dick, Jane Dick & Laura Dick, this 16th day of March, 1868, & by delivering a copy of this writ to the within-named Jennie W. Pogue & Mollie B. Pogue this 24th day of March, 1868, all done in Marion County. The within-named Joseph
9 Booker, William E. Booker, Sallie Booker, Edward Bradley, Rachel A. Booker, Patience M. Booker, not found in Marion County. No such persons as the Sunday School of the 1st Presbyterian C'urch, the 1st Presbyterian Church of Hannibal, Mo., the 2nd Presbyterian Church of Hannibal, Mo., or the Methodist Episcopal Church South, found in Marion County, Mo.

JNO. D. MEREDITH, *Sh'ff*,
By G. W. HEWITT, *D. S.*

Summons to Ralls Co.

Summons issued 10th day of April, 1868, directed to the sheriff of Ralls County.

(Caption & body of summons not copied.)

Which said writ was afterwards returned with the following indorsement thereon, to wit:

Sh'ff's return.

Served the written summons by delivering a certified copy of petition

and writ to William E. Booker, and by leaving copies of writ at the usual place of abode of Joseph Booker and Sallie Booker with a white person (member of the family) over the age of fifteen years. Done in Ralls County, Missouri, May 11th, 1868. The within-named Patience Booker & Rachel Booker not found in Ralls County.

JOHN H. STERIS,
Sheriff of Ralls County, Mo.,
By R. R. ROSSU, *D. S.*

Sh'ff's fee, $4.00.

And afterwards, to wit, on the 13th day of June, A. D. 1868, and
10 during the regular June term of the Hannibal court of common pleas, and before the Hon. William P. Harrison, judge thereof, the following other proceedings were had, to wit:

Order giving leave to amend.

JOHN A. GROVE, SEN., ET AL.,
vs.
WILLIAM BOOKER ET AL.

Now, at this day, come the plaintiffs herein, by their attorney, Thos. L. Anderson, and, on motion, it is ordered that plaintiffs have leave to amend their petition in this cause; whereupon the plaintiffs herein file their amended petition.

Which amended petition is in words and figures as follows, to wit:

Amended petition.

JOHN A. GROVE, SEN'R, JOSHUA H. BROWN, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon & wife, Eliza Jane Dillon, Hanson Dillon & wife, Sarah E. Dillon, John A. Grove, jr., Joseph A. Grove, & Orion E. Grove, pl'ffs,
vs.
WILLIAM COWGILL, DORCAS COWGILL, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William H. Hennigan, Mary H. Hennigan, William Booker, Hiram E. Brown, Loretta Brown, William E. Booker, Sallie Booker, Edward Bradley & Mary W. Bradley, Mollie B. Pogue, Jennie W. Pogue, Rachel Johnson, Mary Dick,
11 Jane Dick, Laura Dick, Rachel A. Booker, Patience M. Booker, The Sunday School of the First Presbyterian Church of St. Clairsville, Ohio; The First Presbyterian Church of Hannibal, Mo.; The Methodist Episcopal Church of Hannibal, Mo.; The Methodist Episcopal Church South, of Hannibal, Mo.; The American Bible Society, def'ts.

Plaintiffs state that, on the day of Oct., 1867, Jacob E. Grove, then a resident of the city of Hannibal, in the county of Marion, in the State of Missouri, died seized of an estate of inheritance in fee simple

to a large quantity of real estate lying and being in the city of Hannibal, & also in the county of Missouri & in the State of Missouri; and the said Jacob E. Grove also died the owner of and possessed of a large amount of personal property and choses in action.

Plaintiffs further state that, at the time of the death of Jacob E. Grove, he had neither wife nor children, and the plaintiffs and defendants are the legal heirs and representatives of the said Jacob E. Grove, except a part of the defendants, to wit, Mollie B. Pogue, Rachel Johnson, Mary Dick, Jane Dick, Laura Dick, The Sunday School of the First Presbyterian Church of St. Clairsville, Ohio; The First Presbyterian Church of Hannibal, The Second Presbyterian Church of Hannibal, Missouri; The Methodist Episcopal Church South, of Hannibal, Missouri, and The American Bible Society, who are legatees in the pretended will hereinafter described.

12 Plaintiffs further state that, after the death of the said Jacob E. Grove, to wit, on the 19th day of October, A. D. 1867, an instrument of writing purporting to be the last will and testament of the said Jacob E. Grove, dec'd, was produced before John R. Hibbert, clerk of the Hannibal probate court of Mason Township, in the county of Marion, in the State of Missouri, at his office in the city of Hannibal, and upon the testimony of the subscribing witnesses to said instrument of writing taken by the said probate clerk, the said instrument of writing was, on the day of , 1867, admitted to probate as the will of the said Jacob E. Grove, dec'd; a certified copy of the said instrument of writing and the order probating the same as the will of Jacob E. Grove, dec'd, is herewith filed and made part of this petition.

Plaintiffs further state that, by the provisions of the said pretended will, the property, real and personal, of which the said Jacob E. Grove died seized & possessed was devised and bequeathed, as therein set forth, to the parties defendants in this suit and some of the plaintiffs.

Plaintiffs now charge and aver that said instrument of writing, so admitted to probate as aforesaid, was not then and is not now the last will and testament of the said Jacob E. Grove, dec'd.

13 Plaintiffs charge and aver that, at the time the said instrument purporting to be the last will and testament of the said Jacob E. Grove, dec'd, was signed and published by said Jacob E. Grove and attested by William P. Harrison and Benj. Stevens, the said Jacob E. Grove was not of sound mind & disposing memory, and therefore incapable of making a will, or disposing of his property.

Plaintiffs also charge and aver that one of said defendants, William Booker, who was appointed one of the executors of said pretended will, had and possessed an undue influence over the said Jacob E. Grove in the making of said pretended will, and did unduly influence him in the disposal of his property and effects, and in the making of said pretended will; wherefore plaintiffs aver that said instrument is not the last will and testament of the said Jacob E. Grove, dec'd.

Plaintiffs further state that by said pretended will the said defendant William Booker and one Hugh H. Wardlow were appointed executors of said pretended will; they, the said Booker and Wardlow, qualified as executors of said pretended will and took upon themselves the execution of the same; that since they so qualified as executors, the said Hugh H. Wardlow has departed this life, leaving the said William Booker as sole surviving executor of said pretended will.

14 Plaintiffs therefore pray that the said order of the probate judge of said Hannibal probate court admitting the said pretended will of the said Jacob E. Grove, dec'd, to probate, be set aside and for

naught held. Plaintiffs further pray that the said instrument of writing purporting to be the will of Jacob E. Grove, dec'd, be adjudged not to be the will of the said Jacob E. Grove, dec'd, and that the same be set aside and for naught held, and grant to plaintiffs such other and further relief as they may be entitled to.

THOS. L. ANDERSON,
Att'y for Pl'ffs.

And afterward, to wit, on the 1st day of September, 1868, defendants filed their answer to plaintiff's amended petition, which is in words and figures as follows, to wit:

Answer to amended petition.

JOHN A. GROVE, SEN'R, JOSHUA H. BROWN, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon & wife Eliza Jane Dillon, Hanson Dillon & wife Sarah E. Dillon, John A. Grov', Jr., Joseph A. Grove, A. Loretta Grove, Clara A. Grove, Orion E. Grove, plaintiffs,

vs.

WILLIAM COWGILL, DORCAS COWGILL, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William H. Hennigan, Mary H. Hennigan, William Booker, Hiram E. Brown, Loretta
15 Brown, William E. Booker, Sallie Booker, Edward Bradley, Mary W. Bradley, Mollie B. Pogue, Jennie W. Pogue, Rachel Johnson, Mary Dick, Jane Dick, Louisa Dick, Rachel A. Booker, Patience M. Booker, The Sunday School of the First Presbyterian Church of St. Clairsville, Ohio, The First Presbyterian Church of Hannibal, Mo., The Methodist Episcopal Church of Hannibal, Mo., The Methodist Episcopal Church South of Hannibal, Mo., The American Bible Society, defendants.

Hannibal court of common pleas, June term, 1868.

Amended petition.

The above-named defendants, for joint answer to the amended petition filed herein, state that the instrument of writing referred to in the petition as having been admitted to probate, &c., was at the time of probating and now is the last will and testament of Jacob E. Grove, deceased.

Defendants for other and further answer herein state, that it is not true as charged in the amended petition that at the time the said instrument of writing, purporting to be the last will and testament of the said Jacob E. Grove, deceased, was signed and published by said Jacob E. Grove and attested by William P. Harrison and Benjamin Stevens, that the said Jacob E. Grove was not of sound mind and disposing memory, and therefore incapable of making a will or dispos-
16

ing of his property. But on the contrary thereof these defendants aver that at the time said will or instrument of writing was signed and published by the said Jacob E. Grove and attested by William P. Harrison and Benjamin Stevens, said Grove was of sound mind and disposing memory and was at said time capable of making a will and disposing of his property.

These defendants further answering, state that it is not true that William Booker, one of the defendants herein, had and possessed an undue influence over the said Jacob E. Grove in the making of said will, as charged in the amended petition.

These defendants further state that it is not true that said Booker unduly influenced said Grove in the disposal of his property and effects or in the making of his will.

Defendants having fully answered, pray to be dismissed with their costs.

A. W. LAMB,
Att'y for Def'ts.

(Order of continuance omitted.)

And afterward, to wit, on the 16th day of June, 1869, and during the regular June term of said court, the following among other proceedings were had, to wit:

Venue from Hannibal C. P. C. to L. C. P. C.

JOHN A. GROVE, SEN'R, ET AL.,
vs.
WILLIAM BOOKER ET AL.

17 Now at this day come the parties herein by their respective attorneys, and on motion and by agreement of parties it is ordered by the court that the venue of this cause be and the same is hereby changed to the Louisiana court of common pleas in Pike County, and it is further ordered by the court that the clerk of this court make out and transmit to the clerk of the said Louisiana court of common pleas a full, true and complete copy of the record and proceedings of this court in this cause duly certified, together with all the original papers filed herein, and not forming a part of the record in this cause.

(The clerk's certificate & the bill of costs to transcript in the Hannibal court of common pleas is omitted here.)

(Continuance omitted.)

And on the 18th day of May, A. D. 1870, and during the regular May term of said Louisiana court of common pleas, the following further proceedings were had in said cause, as appear of record, to wit:

1st order in trial.

JOHN A. GROVE, SEN'R, ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL, DEF'TS.
Petition to set aside will.

Now at this day the parties appear by their respective attorneys and say they are now ready to proceed with the trial of this cause, and by or-

18 der of court a jury comes, to wit: J. J. Steele, B. F. Boone, Charles Murray, A. Humphries, H. L. Hart, A. T. Vaughn, J. L. Dawson, S. J. Dunkum, F. Suda, W. M. Riley, Barnard Kohn, Joseph Malvarn, twelve good and lawful men duly empanneled, tried and sworn to well and truly try the issue joined between the plaintiffs and defendants and a true verdict render according to the evidence. Before the completion of the trial, the same is adjourned until to-morrow morning. Plaintiffs file bond for costs with Thomas L. Anderson, sr., as security.

(Copy of bond for costs omitted.)

And afterward, on the 19th day of May, A. D. 1870, the following among other proceedings were had in said cause, to wit:

2nd order in 1st trial.

JOHN A. GROVE, SEN'R, ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL., DEF'TS.

Now at this day the parties again appear by their respective attorneys, and the jury sworn to try said cause being called, all answer to their names, and the trial is resumed. Before completion adjourned until to-morrow morning.

And on the 20th day of May, 1870, the following proceedings were had in said cause, as appears of record, to wit:

19 *3d order in trial.*

JOHN A. GROVE, SEN'R, ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL, DEF'TS. } Petition to set aside will.

Now at this day the parties again appear by their respective attorneys, and the jury being called, all are found to be present and the trial of the cause is resumed.

After argument, the cause is submitted to the jury, and they return a verdict that they agree to disagree, and by order of the court the jury is discharged and the cause continued until next term.

(The order showing the petition was filed, & the copy of the petition for to change the venue to Macon County, are omitted.)

And afterward, on the 22*st* day of Nov., A. D. 1870, being the second day of the regular November term of said court, the following further entry in said cause appears of record, to wit:

Order of change venue to Macon Co.

JOHN A. GROVE, SEN'R, ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL., DE'FTS.

At this day the parties appear by their respective attorneys, and the petition of the defendants for a change of venue coming on to be heard, by consent of the parties, it is ordered by the court that the venue of

this cause be changed to the circuit court of Macon County, State of Missouri.

20 It is therefore ordered by the court that the clerk of this court make out a full, true, and perfect transcript of all the record and proceedings in this cause, and transmit the same duly certified, together with all the original papers filed in the cause not forming a part of the record, to the clerk of said circuit court of Macon County.

Clerk's certif'.

STATE OF MISSOURI,
County of Macon, ss:

I, C. L. Draper, clerk of the Louisiana court of common pleas, within the county aforesaid, hereby certify that the foregoing pages from page one to page twenty-six inclusive, contains a full, true, and perfect transcript of all the record and proceedings of said court in the cause wherein John A. Grove, sen'r, & others are plaintiffs, and William Booker and others are defendants, petition to set aside will, as fully as the same remain of record and on file in my office as clerk of said court. I further certify the the accompanying papers referred to below are all of the original papers filed in said cause not forming a part of the record thereof.

In testimony whereof, I hereto set my hand as clerk of said court and the seal thereof. Done at office in the city of Louisiana in said county, this 25th day of January, 1871.

[SEAL.] C. L. DRAPER, *Clerk.*

21 And afterward, to wit, on the 20th day of May, A. D. 1872, and during the regular May term of the circuit court, in & for Macon County, Missouri, the following among other proceedings were had, which is in words & figures as follows, to wit:

Order adding other parties as pl'ffs.

JOHN A. GROVE, SEN'R, ET AL., PL'FFS, }
against }
WILLIAM COWGILL & WILLIAM BOOKER & others, defendants. }

And now at this day this cause being called for trial, and both parties appearing by their attorneys, on motion of pl'ffs' attorneys the following persons are made additional pl'ffs, and now enter their appearance as such, to wit, Loretta Lattinthwait & her husband Samuel S. Lattinthwait, Clara A. Metcalf & her husband Jesse P. Metcalf, Sarah W. Grove & Judge B. Grove, a minor, by his next friend John A. Grove, jr.; and it further appearing to the court that Hanson Dillon, on' of the pl'ffs, is dead, and that Sarah E. Dillon has since married Ira Aldrich, therefore the said Aldrich is on his application made a co-plaintiff, and on application of Zephalinda Grove & Joseph Haytower, they are made co-defendants, & this cause is continued generally.

22 And afterward, on the 12th day of September, A. D. 1873, the plaintiffs filed a motion suggesting the death of John A. Grove, sen'r, which is in words and figures as follows, to wit:

Motion suggesting death of J. A. Grove, sen.

In circuit court, county of Macon.

JOHN A. GROVE ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL., DEF'TS.

Now, at this day, comes the surviving plaintiffs in the above entitled cause, and state to the court that since the last term of this court the plaintiff, John A. Grove, sen'r, has departed this life, and ask that his death be recorde' on the records of this court, and that his legal heirs be permitted to appear as plaintiffs in this suit.

ANDERSON, COWEN & WILLIAMS,
For Pl'ffs.

And afterward, on the same day, to wit, Sept. 12th, A. D. 1873, the heirs of John A. Grove, sen'r, filed their motion to be made parties pl'ffs, which motion is in words and figures as follows, to wit:

Motion to make J. A. Grove's heirs parties pl'ffs.

In the circuit county of Macon.

JOHN A. GROVE, SEN., ET AL., PLAINTIFFS,
against
WILLIAM BOOKER ET AL., DEFENDANTS.

Now at this day come John A. Grove, jr., Catherine E. Grove (widow), Rebecca E. Jepson & George Jepson her husband, Cilelia J. Mitchell & Joseph R. Mitchell, her husband, Mary A. Brannan, Blanch L. A. Grove & Maria M. Grove, and state that they are the heirs at law of John A. Grove, sen'r, deceased, and move the court that they be made parties plaintiffs in the place of said deceased, and that this cause proceed. The said John A. Grove, jr., Rebecca E. Jepson, Cecilia J. Mitchell, Mary A. Brannan, Blanch L. A. Grove & Marion M. Grove state that they are the children of the said John A. Grove, deceased; and the said Catherine E. Grove states that she is the widow of the said John A. Grove, sen'r, deceased, & that she & the above named children are the sole heirs at law of said decedent.

23

COWEN, ANDERSON & WILLIAMS,
For Pl'ffs.

And afterward, on the 13th day of September, A. D. 1873, the following among other proceedings were had and order made, to wit:

Order making heirs pl'ffs.

JOHN A. GROVE ET AL.
vs.
WILLIAM BOOKER ET AL.

Death of pl'ff John A. Grove, sen'r, suggested, & heirs made coplaintiffs & continued.

And afterward, on the 29th day of January, 1874, and during the

24 January term of the court, the following among other proceedings were had and order made, which is in words & figures, to wit:

Order of second trial of cause.

In the Macon County circuit court.

JOHN A. GROVE ET AL.
vs.
WILLIAM BOOKER ET AL.

Now, at this day, parties appear by attorneys, and answer ready for trial. The following named persons were duly empanneled and sworn to try this cause, to wit, Aaron Seter, Wm. Vanclive, J. T. Vickroy, James Lyle, Wm. H. McDavit, Nathaniel Simms, John Babcock, jr., R. C. Mitchell, Thomas Burns, Granville H. Thompson, A. S. Lyle, and George Brown, who after hearing part of the testimony, cause continued until to-morrow.

And the aforesaid cause was continued from day to day, when on the 5th day February, A. D. 1874, the following further order was entered of record in said cause, to wit:

Order s'bmitting the case.

JOHN A. GROVE ET AL.
vs.
WM. BOOKER ET AL.

Jury & parties all present, trial again proceeds.

Jury having been instructed of the law in the case by the court, arguments of counsel both pro & con being closed, the jury retire
25 to their room to consider their verdict, and now come again on same day and report they have not agreed on a verdict, when they are adjourned by the court until to-morrow morning at nine o'clock a. m.

And afterward, and during the said January term, 1874, the following further order was made in said cause, on the 6th day of February, A. D. 1874, which is in words and figures, to wit:

Judgment.

JOHN A. GROVE, JR., ET AL., PL'FFS,
vs.
WM. BOOKER ET AL., DEF'TS.

Jury again appear and answer to their names and again return to their room to consider of their verdict. And now again on same day come the jury into court and return the following verdict, to wit:

"We, the jury, find the issue for the plaintiffs.

"A. S. LYLE, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court that said pretended will of the said Erastus Grove be held for naught, null and void, and of no effect.

And afterward, to wit, on the 7th day of Feb'y, 1874, the defendants filed a motion to set aside the verdict in said cause & grant a new trial, which motion is in words & figures as follows, to wit:

26 *Motion for new trial.*

Macon circuit court. Jan'y term, 1874.

JOHN A. GROVE & OTHERS }
vs.
WM. BOOKER & OTHERS. }

And now come the said defendants and move the court to set aside the verdict & judgment in this case and grant a new trial—

1. Because the verdict is against the law & 'gainst the evidence and against the weight of evidence.

2. Because the court gave illegal & improper instructions on behalf of plaintiffs, and refused legal & proper instructions asked by defendants.

3. Because the court admitted illegal & incompetent evidence offered by plaintiffs, and excluded legal & competent evidence offered by defendants.

4. Because the court refused to receive the testimony of Mrs. Booker, who was offered as a witness for defendants.

5. Because some of the jurors who tried this cause were in frequent conversation with some of the plaintiffs in this cause, and held or heard conversation on the subjects involved in this suit.

GEO. P. STRONG,
with DYSART & BROWN,
For Def'ts.

27 And afterward, to wit, on the 15th day of May, 1874, it being during the May term of said court, the following among other proceedings were had, and order made in said cause, which is in words and figures, to wit:

Order granting new trial.

JOHN A. GROVE ET AL., PL'FFS, }
vs.
WM. BOOKER ET AL., DEF'TS. }

Now at this day comes the parties herein, by their attorneys, and the motion heretofore filed to grant defendant' a new trial coming on to be heard, the same was seen, heard, and considered by the court, and the same was by the court sustained. It is therefore ordered by the court that the judgment heretofore rendered in this cause be set aside, and defendant' granted a new trial and this cause continued.

And afterward, on the 9th day of November, A. D. 1874, it being at the September adjourned term, the following among other proceedings were had in said court, and order made in said cause, which is in words and figures as follows, to wit:

Order 2nd trial in Macon cir.

JOHN A. GROVE ET AL., PL'FF, }
vs.
WM. BOOKER ET AL., DEF'TS. }

Now at this day, this cause being called, parties answer ready for

trial and demand a jury, when the following named jurors were
28 duly sworn and empanel'd to try this cause, to wit: S. J. O. Tompkins, John W. Gates, John Buchanan, Joseph Somers, James A. Terrell, T. B. Miller, Willis Sears, Hopkin Evans, John Gentle, W. W. Bucker, Jefferson Buster, and J. N. Buster, when said cause was continued until to-morrow.

The cause was proceeded with from day to day, when, on the 14th day of November, A. D. 1874, the following among other proceedings were had, & further order made in said cause, which is in words and figuses as follows, to wit:

2 order in 2 trial.

JOHN A. GROVE ET AL., PL'FF,
vs.
WM. BOOKER ET AL., DEF'TS.

Now again come the parties, by attorneys, and jury all present, trial again proceeds. Evidence and arguments of counsel having been heard, and jury instructed of the law by the court, the jury retire to their room to consider their verdict. And now come again on same day and report that they cannot agree upon a verdict, and are discharged by the court and cause continued.

And afterward, at the January adjourn' term, on April 14th, 1875, the following among other proceedings were had in said cause, which is in words & figures following, to wit:

29 *Order in 3rd trial.*

JOHN A. GROVE, SEN'R, JOSHUA H. BROWN, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon, Sarah E. Dillon, John A. Grove, jr., Joseph A. Grove, A. Loretta Grove, Clara A. Grove, Zephalinda Grove, William Cowgill, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William H. Hennigan, Mary H. Hennigan, plaintiffs,
against
WILLIAM BOOKER, JOSEPH BOOKER, HIRAM E. Brown, Loretta Brown, William E. Booker, Sallie Booker, Edward Bradley, Mollie B. Pogue, and Jennie W. Pogue, Rachel Johnson, Mary Dick, Jane Dick, Laura Dick, Rachel A. Booker, Patience M. Booker, the Sund'y School of the First Presbyterian Church, the Presbyterian Church of Hannibal, Missouri, the Second Presbyterian Church of Hannibal, Missouri, the Methodist Episcopal Church South, and the American Bible Society, defendants.

Now at this day this cause coming up for trial, the parties, both plaintiffs and defendants, by their respective attorneys, answer ready

for trial, and a jury is demanded, when the following persons were sworn and empanneled to try this cause, to wit, Thomas Pool, H. Vanderberg, Newton Switzer, Benj. E. Guthrie, Payton Y. Hurt, Evans Wright, George W. Elliot, S. C. Powell, Louis Gaunt, A. Cassiday, E. M. Stivers, & James Moody, and trial proceeded with. After a
30 part of the evidence in the case had been heard, and not being able to complete the case on this day, the court adjourned until 8 o'clock to-morrow morning.

And afterward, on the 20th day of April, 1875 (the trial having proceeded from day to day), the following further order was entered in said cause, to wit:

Final order.

JOHN A GROVE ET AL., PL'FFS,
vs.
WILLIAM BOOKER ET AL., DEF'TS.

Now at this day the jury comes again into court and report that the jury disagrees; when they are discharged by the court and this cause continued.

[It was agreed by counsel in the U. S. circuit court that there was a regular term of the Macon County circuit court held, commencing the (3rd) third Monday of May, 1875, & that this cause was then continued.]

And afterward, to wit, on the 21st day of Sept., A. D. 1875, the defendants filed their petition & affidavit and bond, asking for an order to remove this cause to the United States circuit court for the western district of Missouri, which petition and affidavit are in words & figures as follows, to wit:

Petition for venue to U. S. C. C.

31 To the honorable the judge of the circuit court of the county of Macon, State of Missouri:

The petition of the American Bible Society respectfully represents that it is a corporation duly incorporated by and located in the State of New York; that it is a party defendant in a certain suit of a civil nature now pending in the circuit court of Macon County, State aforesaid, which is in the western district of Missouri, wherein John A. Grove and others are plaintiffs, and William Booker, executor of the last will and testament of Jacob E. Grove, deceased, and this petitioner and others, are defendants; that said John A. Grove and others, plaintiffs, as aforesaid, are residents and citizens of the State of Ohio, and other States, other than the State of New York; that none of said plaintiffs reside in or are citizens of the State of New York; that said controversy is wholly between citizens of different States, and can be fully determined as between them; that petitioner is actually interested in said controversy (being in fact the only party whose interests plaintiffs profess to desire to affect in said controversy); that the amount involved in said controversy exceeeds five thousand dollars.

Petitioner further states that it has reason to believe, and does be-

lieve, that from prejudice and local influence it will not be able to obtain justice in said circuit court of Macon County aforesaid.

32 Wherefore petitioner prays that said suit may be removed into the circuit court of the United States for the western district of Missouri.

AMERICAN BIBLE SOCIETY,
By GEO. P. STRONG,
its Att'y.

SEPT. 13th, 1875.

Geo. P. Strong, being duly sworn, on his oath says he is the agent and attorney of the petitioner above named; that said petitioner is a corporation, and is not a resident of the State of Missouri, but is incorporated by & located in the State of New York, and has entrusted the care and conduct of this suit mainly to this affiant, who has almost from its institution been connected with it, & has personal knowledge of the matters and things in said petition set forth. Affiant states that he believes the matters and things in said petition set forth affiant states that he believes the matters and things in said petition set forth to be true, and that from local influence and prejudice said petitioner will not be able to obtain justice in said circuit court of Macon County aforesaid.

GEO. P. STRONG.

Sworn to and subscribed before me, F. M. Judson, a notary public within & for the county of St. Louis, State of Missouri, this 18th day of September, A. D. 1875.

33 In testimony whereof I hereunto affix my signature and seal of office the day and date last above named.

[SEAL.] F. M. JUDSON,
Notary Public, St. Louis County.

And which bond aforesaid is in words & figures as follows, to wit:

Bond for costs to U. S. C. C.

Know all men by these presents, that we, George P. Strong as principal, for and on behalf of the American Bible Society, and William Booker, esq'r, as surety, are held and firmly bound unto John A. Grove and others, plaintiffs in the suit against Wm. Booker, executor of the last will and testament of Jacob E. Grove, deceased, the American Bible Society and others, now pending in the circuit court of Macon County, State of Missouri, in the penal sum of two hundred and fifty dollars, lawful money, to be paid to the said John A. Grove and others, plaintiffs as aforesaid, for the payment whereof, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this thirteenth day of September, A. D. 1875.

The condition of this obligation is such, that whereas the above named American Bible Society has petitioned for the removal of the above mentioned suit into the circuit court of the United States for
34 the western district of Missouri:

Now, if said American Bible Society shall enter its appearance and file in said circuit court of the United States, on or before the first day of the next term thereof, a copy of the record in said suit, and shall

also pay all costs that may be awarded by said circuit court of the United States if such court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtre.

GEO. P. STRONG. [SEAL.]
WILLIAM BOOKER, *Ex.* [SEAL.]

STATE OF MISSOURI,
County of Macon, ss:

I, Thos. A. Smedley, clerk of the circuit court within and for the county and State aforesaid, certify that the foregoing pages, from page one to page thirty-three inclusive, contain a full, true, and complete transcript of all the record and proceedings of said court, except as therein stated, in the case of John A. Grove, jr., & others, are plaintiffs, and William Booker and others are defendants, petition to set aside will, as fully as the same remain of record and on file in my office as clerk of said court.

In testimony whereof, I hereto set my hand as clerk of said court and the seal thereof.

35 Done at office in said county this 8th day of November, A. D. 1875.

[SEAL.] THOS. A. SMEDLEY, *Clerk*,
By A. A. GILSTRAP,
Deputy Clerk.

And afterwards, at a regular stated term of the said circuit court of the United States in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday, being the 15th day of November, A. D. 1875, the following proceedings were had in this case on the 27th day of November, in said last mentioned year, to wit:

Motion filed to set case for hearing.

JOHN A. GROVE
vs. } 602.
WILLIAM BOOKER, EX'R, ET AL.

This day comes the complainant, by Thomas J. C. Fagg, esqr., his solicitor, and files his motion to set this case down for hearing.

Which motion so filed as aforesaid is in words and figures following, to wit:

U. S. circuit court, western dist. Nov. T., 1875.

Motion.

JOHN A. GROVE ET AL.
v.
WILLIAM BOOKER ET AL.

36 Now at this day comes the plaintiffs, by their attorneys, and move the court to set down the above entitled cause for hearing on the third day of the next regular term of this court in April next, &c.

ANDERSON, WILLIAMS & FAGG.
Att'ys for Pl'ffs.

And afterwards, to wit, on the 6th day of March, A. D. 1876, it being an adjourned day of the said last mentioned regular stated November term, 1875, of said court, the following proceedings were had in said cause, to wit:

JOHN A. GROVE
vs.
WILLIAM BOOKER ET AL. } 602.

Ordered that this case be continued.

And afterwards, on the 15th day of April, A. D. 1876, it being in vacation of said circuit court, the following proceedings were had in said case, to wit:

Motion to remand filed. Motion filed.

JOHN A GROVE
vs.
WILLIAM BOOKER ET AL. } 602.

This day there is received by mail from John F. Williams, esqr., and T. J. C. Fagg, esqr., solicitors for complainant, and filed herein, a
37 motion to remand the above entitled cause to the circuit court of Macon County, Missouri.

Which motion to remand so filed as aforesaid is in words and figures following, to wit:

Motion to remand.

In the United States circuit court for the western district of Missouri, April term, 1876.

JOHN A. GROVE ET AL., PLAINTIFFS,
against
WM. BOOKER ET AL., DEFENDANTS. } Motion to remand.

Now, at this day, come the plaintiffs in the above-entitled cause, by their attornies, and move the court to remand the same to the circuit court of Macon County, Missouri, for the following reasons:

1st. Because the petition for the removal of this cause from the State court to the circuit court of the United States was not filed before or at the term at which said cause could be first tried, nor before the trial thereof.

2nd. Because the petition does not state that plaintiffs, or either of them, are now or ever were citizens of the State of Missouri.

3rd. Because there is no affidavit to the petition for removal.

4th. Because there has been no order of the Macon circuit court for the removal of this cause from its jurisdiction.

JOHN F. WILLIAMS &
T. J. C. FAGG,
Att'ys for Pl'ffs.

38 And afterwards, at the regular stated term of said circuit court begun and held on the third Monday of April, A. D. 1876, at the

place aforesaid, the following further proceedings were had in this case on the 17th day of April, 1876, to wit:

Motion to remand submitted & sustained.—Appeal granted.—Order to make out transcript for U. S. Supreme Court.

JOHN A. GROVE
vs.
WILLIAM BOOKER, EX'R, ET AL.

This day come the parties, by their solicitors, the complainants by John F. Williams, esq'r, and the defendant, the American Bible Society, by George P. Strong, esq'r, and thereupon the motion to remand heretofore filed, is argued by counsel and submitted to the court, upon consideration whereof and being fully advised in the premises, it is ordered that said motion be sustained. It is further ordered that this cause be remanded to the circuit court of Macon County, Missouri. Whereupon said defendant, by its counsel, excepts to the judgment and decision of the court, and prays an appeal in this case, which is granted. It is thereupon ordered that the clerk make out and transmit to the clerk of the United States Supreme Court a transcript of the record and proceedings in this case duly certified according to law.

39 And afterwards, on the 5th day of July, A. D. 1876, it being in vacation of said circuit court, the following proceedings were had in said case, to wit:

Bond ordered & approved.

JOHN A. GROVE ET AL.
vs.
WILLIAM BOOKER ET AL.

This day there is received by mail from George R. Strong, esq., attorney for the American Bible Society, defendant in the above cause, a bond for supersedeas in the sum of five hundred dollars ($500), and said bond is thereupon presented to the honorable Arnold Krekel, judge, and duly approved and ordered filed.

And which said bond is in words and figures following, to wit:

Bond.

Know all men by these presents that we, George P. Strong, for the American Bible Society, as principal, William Booker & S. M. Breckenridge, are held and firmly bound unto John A. Grove, Joshua H. Brown, Elizabeth A. Brown, J. Dew Wright, Mary Louisa Wright, Abner Dillon, Sarah E. Dillon, Joseph A. Grove, A. Loretta Grove, Clara A. Grove, Zephalinda Grove, William Cowgill, Dorcas Cowgill, Richard Brown, William Brown, William A. Hall, Elizabeth Hall, John Brown, William H. Hennegan and Mary H. Hennegan, plaintiffs in the suit hereinafter named, in the just and full sum of five hundred
40 dollars, to be paid to the said John A. Grove and others, plaintiffs and obligees above named, to which payment, well and truly to be made, we bind ourselves, our successors, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 12th day of May, A. D. 1876.

Whereas lately at the April term, A. D. 1876, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between the above-named John A. Grove and others, plaintiffs, and said American Bible Society and others, defendants, a final judgment or order was rendered against said American Bible Society ordering and directing that said cause be remanded to the circuit court of Macon County, State of Missouri, and the said American Bible Society having appealed from said judgment or order to the Supreme Court of the United States:

Now the condition of the above obligation is such that if said American Bible Society shall prosecute said appeal with effect, and answer all damages and costs, if it shall fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE P. STRONG, [SEAL.]
For the Am. Bible Society.
WILLIAM BOOKER. [SEAL.]
S. M. BRECKENRIDGE. [SEAL.]

App'd.

A. KREKEL, *Judge.*

41 *Affidavit.*

STATE OF MISSOURI,
County of Monroe, ss:

Personally appeared before me, the undersigned, a notary public within and for said county and State, the above-named William Booker, to me well known to be the person who executed the foregoing appeal bond, who, being duly sworn, on his oath says he is worth more than the sum of five hundred dollars after all his just debts and legal obligations of every kind are paid and discharged.

In testimony whereof, I hereunto affix my signature and seal of office this 7th day of June, 1876, at my office in Monroe City, Monroe Co., Mo. I was commissioned notary public on the 24th day of June, 1873, & my commission expires the 24th of June, 1877.

[L. S.] R. B. BRISTOW,
Notary Public M. C., Mo.

Affidavit.

STATE OF MISSOURI,
County of St. Louis, ss:

Before me, G. A. Castleman, a notary public within & for said county, personally came Sam'l M. Breckinridge, to me well known, whose genuine signature appears to the foregoing appeal bond, who, being duly sworn, says that he is worth more than five hundred dollars after
42 all his just debts and legal obligations are discharged.

In testimony whereof I hereunto affix my signature and seal of office, this 26th day of June, A. D. 1876, at my office, in the city of St. Louis, State & county aforesaid. I further certify that I was qualified a notary public May 31st, A. D. 1873, and my commission expires May 24th, A. D. 1877.

[L. S.] G. A. CASTLEMAN,
Notary Public St. Louis Co, Mo.

43 UNITED STATES OF AMERICA,
Western District of Missouri, set:

I, Henry C. Geisberg, clerk of the circuit court of the United States for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in the case (No. 602) of John A. Grove et al. against William Booker et al. as fully as the same remains of record and file in my office.

Witness my hand as clerk and the seal of said court, this thirteenth day of September, 1876.

[SEAL.]

H. C. GEISBERG, *Clerk*,
By HENRY NITCHY, *D. C.*

44 (Indorsed:) Case No. 602. United States circuit court, western district of Missouri. John A. Grove et al. vs. William Booker et al. Duly certified copy of the transcript of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 336. The American Bible Society, plaintiff in error, vs. John A. Grove, J. H. Browne, E. A. Browne, et al. W. Missouri C. C. U. S. Filed 15th February, 1877.

REC. 336—3

No. 107.

Supreme Court of the United States,

OCTOBER TERM, 1879.

THE AMERICAN BIBLE SOCIETY,
Appellant,

vs.

JOHN A. GROVE and others,
Respondents.

PHILADELPHIA BAR ASSOCIATION

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT AND BRIEF FOR APPELLANT.
BY GEORGE P. STRONG.

Supreme Court of the United States,

OCTOBER TERM, 1879.

THE AMERICAN BIBLE SOCIETY,
Appellant,

vs.

JOHN A. GROVE and others,
Respondents.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT FOR APPELLANT.

This case is brought here from the circuit court of the United States, for the western district of Missouri.

It is a suit in the nature of a bill in chancery to set aside the will of Jacob E. Grove.

The only question for determination now is, as to the propriety of the order made by the circuit court remanding said cause to the circuit court of Macon County.

The cause had been pending in that court for several years, had been tried four times, at three of which trials the jury disagreed, and at one of which there was a verdict for plaintiffs or petitioners, which verdict was set aside, and a new trial granted by the court.

After these mistrials, a petition was filed by the American Bible Society, one of the defendants, for a removal of the suit, to the circuit court of the United States, on the

ground of such local influence and prejudice that said defendant will not be able to obtain justice in the State court.

The petition is as follows :

To the Honorable the Judge of the circuit court of the county of Macon, State of Missouri.

The petition of the American Bible Society respectfully represents, that it is a corporation duly incorporated by, and located in the state of New York ; that it is a party defendant in a certain suit of a civil nature, now pending in the circuit court of Macon County, State aforesaid, which is in the western district of Missouri, wherein John A. Grove and others are plaintiffs, and William Booker, executor of the last will and testament of Jabob E. Grove, deceased, and this petitoner and others, are defendants. That said John A. Grove and other plaintiffs, as aforesaid, are residents and citizens of the state of Ohio and of other states, other than the state of New York ; that none of said plaintiffs reside in, or are citizens of the state of New York ; that said controversy is wholly between citizens of different states, and can be fully determined as between them ; that petitioner is actually interested in said controversy, (being in fact the only party whose interests plaintiffs profess to desire to affect in said controversy,) that the amount involved in said controversy exceeds five thousand dollars. Petitioner further states that it has reason to believe and does believe, that from prejudice and local influence it will not be able to obtain justice in said circuit court of Macon county aforesaid : wherefore petitioner prays that said suit may be removed into the circuit court of the United States for the western district of Missouri.

AMERICAN BIBLE SOCIETY,

Sept. 13, 1875. By GEO. P. STRONG, *its attorney.*

George P. Strong being duly sworn, on his oath says, he is the agent and attorney of the petitioner above named ; that said petitioner is a corporation, and is not a resident of the State of Missouri, but is incorporated by, and located in the

State of New York, and has intrusted the care and conduct of this suit mainly to this affiant, who has, almost from its institution, been connected with it, and has personal knowledge of the matters and things in said petition set forth. Affiant states that he believes the matters and things in said petition set forth, to be true, and that from local influence and prejudice, said petitioner will not be able to obtain justice in said circuit court of Macon county aforesaid.

GEO. P. STRONG.

Sworn to and subscribed before me, F. M. Judson, a notary public, within and for the county of St. Louis, State of Missouri, this 18th day of September, A. D. 1875.

In testimony whereof I hereunto affix my signature and seal of office the day and date last above named.

F. M. JUDSON,
Notary public St. Louis County.

The bond was filed as required by the act of Congress, (see record p. 16,) and the record was filed in the circuit court of the United States for the western district of Missouri, November 13th, 1875, in vacation, the regular November term commencing November 15th, 1875. (Record pp. 1, 17.)

On the 27th day of November 1875, the complainant by Thos. J. C. Fagg, his solicitor, filed his motion to set this case down for hearing as follows:

"Now at this day come the plaintiffs by their attorney and move the court to set down the above entitled cause for hearing on the third day of the next regular term of this court in April next, etc."

ANDERSON, WILLIAMS & FAGG,
Attorneys for Plaintiffs.

(Record p. 17.)

On the 6th day of March 1876, it was ordered that this case be continued."

On the 15th day of April 1876, a motion to remand said

cause for the following reasons was filed by plaintiffs by their attorneys.

"1st. Because the petition for the removal of this cause from the State court to the circuit court of the United States was not filed before or at the term at which said cause could be first tried, nor before the trial thereof.

2nd. Because the petition does not state that plaintiffs, or either of them, are now, or ever where citizens of the State of Missouri.

3rd. Because there is no affidavit to the petition for removal.

4th. Because there has been no order of the Macon circuit court for the removal of this cause from its jurisdiction.

This motion was sustained and this cause remended.

To this decision defendant excepted, and prayed an appeal to this court which was granted.

JOHN A. GROVE, *et al.*, *Respondents*,
vs.
AMERICAN BIBLE SOCIETY, *Appellant*,
Impleaded with WM. BOOKER, *et al.*

ASSIGNMENT OF ERROR.

And now comes the said appellant, the said American Bible Society by George P. Strong, its attorney and counsel, and says that in the record and proceedings in said circuit court, there is manifest error in this to-wit :

The said circuit court erred in sustaining respondents' motion and in remanding said cause to the circuit court of Macon county, Missouri.

GEO. P. STRONG,
For appellant.

ARGUMENT FOR APPELLANT.

Petitioner now asks this court to review the order remanding this cause to the State court, and submits that said order was erroneous.

The various statutes or acts of congress authorizing a removal of certain causes from a state to the Federal Court, found in the judiciary act of 1789 and subsequent acts, have been substantially re-enacted and are found in the revised statutes of the United States 1873, page 113, section 639, and also in the act of March 3rd, 1875.

The provisions of these statutes, so far as they relate to such a case as that now before the court are as follows:

Section 639, p. 113, Revised Statutes United States, 1873, provids, that "any suit commenced in any State court wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section."

"First, when the suit is against an alien, or is by a citizen of the State wherein it is brought, and against a citizen of another State, it may be removed on the petition of such defendant, *filed in said State court, at the time of entering his appearance in said state court.*"

"Second, when the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State, against a citizen of the same, and a citizen of another State, it may be so removed as against said alien or citizen of another State, upon the petition of such defendant, filed at any time before the trial, or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as con-

cerns him without the presence of the other defendants, as parties in the cause.

"But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants."

"Third, when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before, or at the time of filing said petition he makes and files in said court an affidavit, stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court."

The act of March 3, 1875, 18 Statutes at Large p. 470, section 2, provides "that any suit of a civil nature at law or equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State, claiming lands under grants of different states or a controversy between citizens of a State, and foreign States, citizens or subjects, either party may remove said suit in the circuit court of the United States for the proper district.

"And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Sec. 3. * * *. Petition for removal to be filed in the State court, "before or at the term at which said cause could be first tried and before the trial thereof for the removal into the

circuit court to be held in the district where such suit is pending," &c. Bond to be filed.

Sec. 10. "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

These statutes have been repeatedly before the court, and have received judicial construction in a great variety of cases, but so far as the decisions of this court have been published, either in the official reports of the court, or in leading law journals, I find no case bearing any striking similarity to the case now before the court.

The manifest intent of Congress in all its legislation upon this subject of a removal of causes, has been to confer upon different classes of persons, that security for the protection and enforcement of their rights, which the framers of the Federal Constitution provided for in Art. III, Sec. 2.

So much of this section as relates to the case at bar, is as follows:

"Sec. 2. The judicial power shall extend to all cases in law and equity, * * * "*between citizens of different States.*'"

The first act of 1789 allowed an alien, or a citizen of a State other than that in which the suit was brought, when sued in a State court, to transfer the cause to the Federal court, "at the time of entering his appearance in the State court."

This act furnished very limited relief, both as to the party entitled to the benefit of the act, and as to the time, when this benefit must be sought. Only the defendant could seek the removal, and he must ask for it when he entered his appearance.

It has been held that this act applied only when all the defendants were aliens or citizens of another State, so that if a citizen of the State in which the suit was brought, and a citizen of another State were co-defendants, the latter could remove the cause.

To enlarge the operation of the statute, and thus more fully carry out the constitutional provision, the act of July 27th,

1866, provided that although a citizen of the State where the suit was brought, was joined with the alien, or with the citizen of another State, the latter might remove the cause, upon petition "filed at any time before the trial or final hearing of the cause" if it was "a suit in which there could be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause."

This act made most important changes, and came much nearer than the act of 1789, to the idea embodied in the Constitution, that every citizen when engaged in a controversy with a citizen of a State other than his own, was entitled to the protection afforded by the Federal courts, and was not to be deprived of such protection by reason of the fact that other persons, not entitled to such protection were parties to the suit. It also greatly enlarged the time at which the removal must be sought. It could be had "at any time before the trial or final hearing of the cause." Another most important feature of this act, was that it permitted a removal, even when such removal resulted in dividing the cause into two distinct suits, one of which could be prosecuted in the State court, while the other was removed to the Federal court.

This act was defective in this, that only a defendant could seek a removal. A plaintiff, non-resident, could of course, bring his suit in the Federal court, in the first instance, but if he brought it in the State court, and if, for any cause, a removal was desired after the suit was brought no provision was made for such removal in favor of the plaintiff.

To remedy this defect and provide for a removal by a plaintiff in certain cases, the act of 1867 provides: "when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before, or at the time of filing said petition, he makes and files in said State court, an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such State court."

In all these acts, it will be observed that Congress has failed to furnish the full measure of relief, authorized by the Federal constitution. That instrument conferred upon Federal courts, jurisdiction in all cases in law or equity, "*between citizens of different States.*"

There is no restriction here, to cases where one of the parties was a citizen of the State where the suit was brought. The only question controlling the jurisdiction, so far as citizenship was concerned, was, Are the litigants citizens of different States? or, in other words, Is there a controversy between citizens of different States? If so, then the constitution provided for investing the Federal courts with authority to try the cause. Such jurisdiction has long been exercised by the Federal courts in cases originally brought there, but it was not until the act of Congress of March 3, 1875, was passed, that the requirement that one of the parties should reside in the State where the suit was brought, was omitted, and a general right to a removal granted in all cases "*in which there shall be a controversy between citizens of different States,*" without any reference to the fact whether either of the litigants resided in the State where the suit was brought. By this act it appears plain that Congress intended to authorize a removal, if the parties seeking it resided in a different State from his adversary, no matter where the suit was brought. This act seems to come up to the full intent of the framers of the Federal Constitution as to the jurisdiction of Federal courts, so far as that jurisdiction is affected by the citizenship of the litigants. It gives to every citizen the right to a hearing in the Federal courts whenever he becomes engaged in a controversy with a citizen of a different State, resulting in a suit at law or in equity.

In the case at bar, the petitioner has sought the benefit of this legislation, and as it believes has brought itself within the provisions of these acts of Congress, which have never been repealed, but remain to-day the law of the land.

The act of March 3, 1875, section 10, provides "that all

acts and parts of acts in conflict with the provisions of this act are hereby repealed."

It has been held that the act of 1867, is not in conflict with the provisions of the act of 1875, and is not therefore repealed by it.

While the citizenship of the parties is a controlling circumstance in all these acts, the act of 1867 is peculiar in that it does not give the right of removal on account of citizenship at all. True it is only given to citizens of different States, but it is not given on that account. To entitle such citizen to this right he must file with his petition an affidavit that from prejudice or local influence, he will not be able to obtain justice in the State court. Without such an affidavit no right of removal is given to either party, by that act.

There is nothing in this provision, in conflict with the act of 1875, and therefore it has been rightly held to remain in force.

There is however in the act of 1867 a restriction as to parties, which is omitted in the act of 1875, and is not in harmony with it. By the former act it is required that one of the parties must be a citizen of the State in which the suit is brought. By the latter act, it is only required that the parties shall be citizens of different States. Neither of them is required to be a citizen of the State where the suit is brought.

In this respect the act of 1875 gives the right of removal in a more extended class of cases. It embraces all cases in which the parties are citizens of different States.

But it is contended by respondents that the removal can only be had when applied for "before or at the term at which said cause could be first tried, and before the trial thereof."

If this be so, then the act of 1867 is entirely repealed or superseded by the act of 1875, for under the act of 1875 every person who could secure a removal by filing an affidavit as required by the act of 1867, can secure a removal without any affidavit. The act of 1867, if such be the construction of the act of 1875, is rendered entirely nugatory, wholly useless, and there is no provision in the present law which secures to litigants the rights specially conferred by the act of 1867.

That act was designed to meet a condition of things which no doubt has often been found to arise in the course of protracted litigation, and which has actually arisen in the case at bar. To take the present case as an illustration. At the commencement of the suit, there was nothing to indicate the existence of prejudice or local influence, that would prevent a fair trial. But in the course of eight or ten years of litigation during which several trials might have occurred, one of the parties may have been forced to the conclusion that his rights were denied, from prejudice or local influence.

But because he had not made this discovery before any trial could be had, when perhaps the prejudice did not exist, he has no relief, and must submit to a trial under such influences, and suffer the consequences.

There may be, and no doubt are cases where local prejudice is known to exist against certain classes of persons, independent of any suit, or legal proceedings, and if one of that class is involved in litigation, he would be able to make the necessary affidavit at the commencement of the suit. But in most cases, such prejudice would generally be created by the pendency of the suit by the representations and personal efforts of some of the litigants, or by sympathy with one side or the other in the controversy, and could not be known, because it would not exist until it was too late to secure the benefit of the act of 1875.

The American Bible Society is generally regarded as one of the most popular charitable institutions in the country, and it might well suppose that it would meet with an impartial hearing in any civilized community.

But when the question at issue, was, whether a testator should have the right to select the objects to which he would leave the larger portion of his estate, even when he did not choose his nephews and nieces, or his grand nephews and grand nieces, it may be discovered that many jurors will find incompetency or undue influence, not because the testimony leads to such a conclusion, but because they *do not believe in that sort of a will.*

If such a controversy should arise as it has often arisen, between citizens of different States, Congress has provided in the act of 1867 for the removal of the case to the Federal court, where such prejudice cannot be so easily aroused, and can be more strictly controlled by a court, much farther removed from the influence of such prejudice than the State courts are apt to be.

But until the act of 1875 was passed, this relief was confined to cases where one of the parties was a citizen of the State in which the suit was brought.

The question now arises, did Congress, after adopting so useful and just a law, intend by the act of 1875 to deny the right of removal for the cause of prejudice, or make its enjoyment depend upon its exercise at the commencement of the controversy before the necessity for the removal would ordinarily be discovered.

In all the action of Congress upon this subject, there has been a steady enlargement of the benefits of the removal, by bestowing them upon a greater variety of persons. None of the acts passed shows any intention to retrace the steps, which have already been take, or to deprive any citizen, once invested with a right to a trial in the Federal court, of the privilege thus conferred.

It is true that the act of 1875 has prescribed an earlier time for the application than that prescribed in the act of 1867 and when a removal is sought, on the sole ground of citizenship in different states, there is no hardship or injustice in requiring the application to be made "at or before the term at which a trial could *first* be had, and before the trial."

The moment the suit was brought the party could know, whether he was entitled to a removal or not. If he was, it was reasonable that he should make his application at an early day, so that unnecessary delay might be avoided.

Hence where the removal is sought solely on the ground of citizenship in different states, Congress has limited the time for the application, to the term at which a trial could first be had, and before the trial.

Such a provision does not in the least conflict with the provisions of the act of 1867, that where the removal is sought, (not on the ground of citizenship), but on the ground of "prejudice and local influence," the removal could be had at any time before the final trial or hearing of the cause.

Both provisions are essential to a perfect and harmonious system, that shall fully embody both the letter and spirit of the constitution, and both are essential to the complete enjoyment of constitutional rights.

The time at which the removal may be made, by the act of 1867, is as essential to the full enjoyment of an impartial trial as the right of removal itself.

The act of 1867 and the act of 1875 are both a part of the law of the land, and when construed together, secure to every citizen involved in a controversy with a citizen of a different State, a trial in the Federal court. If he seeks it, solely on the ground of citizenship, he must apply for it at the time at which his case can first be tried. If he seeks it on the ground of prejudice, he must ask it before the final trial or hearing of his cause.

This controversy arises under the statutes of Missouri.

The law providing for such a contest is found in chap. 131. Rev. statutes of Missouri, 1865, p. 530, sections. 29 and 30. These sections provide as follows:

Sec. 29. "If any person interested in the probate of any will, shall appear within five years after the probate or rejection thereof, and by petition to the circuit court of the county, contest the validity of the will or pray to have the will proved which has been rejected, an issue shall be made up, whether the writing produced be the will of the testator or not, which shall be tried by a jury, or, if neither party require a jury, by the court."

Sec. 30 "The verdict of the jury or the finding and judgment of the court shall be final, saving to the court the right of granting a new trial as in other cases, and to either party an appeal in matters of law to the supreme court."

Under these statute the case at bar was brought. It is a

suit partaking in its main features of the character of a bill in equity, to set aside a conveyance or other instrument in writing, whereby title to property may be affected on the ground of incompetency or undue influence in the making of it.

The issue to be tried by a jury is provided for by the statute, instead of its being left to the discretion of the chancellor to order an issue to be made up and sent out to be tried by a jury, under the practice in chancery courts.

It comes therefore within the acts of Congress providing for the removal of causes.

Gaines *vs.* Fuentes, 2 Otto, 10.

The appellant seeks the removal of this case on the following grounds:

1. It is a controversy between citizens of different States, the appellant being a citizen of New York, and every other party to the record, residing in other States, none of them being citizens of New York.

2. There is such prejudice and local influenee existing in Macon county, Missouri, where the suit was pending, that appellant could not obtain justice there.

3. That the controversy is wholly between citizens of different States and can be fully determined as to them, and that appellant is actually interested in said controvesy.

Upon these grounds the acts of 1867 and 1875 allow a removal upon the petition of "*either one or more of the plaintiffs or defendants.*"

It is objected that this is not a controversy wholly between citizens of different States.

The petition for removal alleges that fact, and it is not denied.

And no such objection was made in the court below. The only ground in reference to citizenship for remanding the cause, stated in the motion, was "because the petition does

not state that plaintiffs, or either of them, are now or ever were citizens of the State of Missouri."

This reason rests solely on the statutes existing prior to 1875, by which one of the parties must be a citizen of the State where the suit was brought.

This was changed by the act of 1875, and the objection now made for the first time in this court, comes too late.

If the act of 1867 is not repealed, then any citizen having a controversy with a citizen of another State, may remove the case for the reasons specified in either act.

To support this objection, reference is made to the pleadings, showing that a presumption arises from the names of some of the defendants that they are residents or citizens of Ohio, the State of the plaintiffs.

"The sunday school of the First Pres. Church of St. Clairsville, Ohio," is named as the party or the *citizen* of the same State as plaintiffs.

It is difficult to perceive, how an unincorporated sunday school can be a citizen of any State or be recognized by any court as a person or a body politic having any right to sue or be sued.

There is no provision in the statutes of Missouri, as to what persons shall be made parties to a proceeding to set aside a will.

The only provision is found in sec. 29, quoted above, that "any party interested may file the petition."

It might well be that a single item of the will might have been procured by the undue influence of the beneficiary and that only that item could be set aside.

If the whole record of the evidence in this case was before the court, it would be seen that the devise or bequest to this appellant who is the residuary legatee was the only part of the will objected to by the petitioners.

There is no community of interest, no joint interest in the defendants in this case.

The will devises or bequeaths to one party a particular piece of property or sum of money, and to another a different piece.

It is true, the will is the common source or muniment of title, but each takes a separate and distinct piece of property, and after all the other beneficiaries have received their legacies, the American Bible Society takes the residue.

They are no more interested jointly than any parties would be who claimed different tracts of land, all of which had been originally embraced in a Spanish grant to a single individual; in case the validity of such grant was contested, each would defend for his own interest.

The controversy is distinct as between plaintiffs and each defendant. Any party interested in sustaining the will may intervene for his own interest. But the controversy, so far as this appellant is interested in it, is between the plaintiffs or contestants and this appellant.

If every other beneficiary were a party contestant, the appellant would have a right to defend his own interest, and if the will was held invalid, it would divest appellant of all title or interest in the property of the estate that by the will was devised to it.

The practice in Missouri is to make all the beneficiaries parties to this proceeding. In some respects it is treated as a proceeding *in rem*, and upon proper notice, all parties interested may be heard for or against the will, and the decree or verdict will bind all, that is, it will amount to the proof of the will in solemn form.

The motion to remand the cause was made too late.

The record was filed in the Federal court, November 13, 1875. (Rec. p. 1.) The term commenced November 15, 1875. (Rec. p. 17.)

On the 27th November 1875, being the same term, the following entry appears:

JNO A. GROVE *at al.*,
vs.
WILLIAM BOOKER *et al.*

U. S. cir. court West. Dist. November term 1875.
Motion.

Now at this day come the plaintiffs by their attorneys and move the court to set down the above entitled cause for hear-

ing on the third day of the next regular term of this court in April next.

ANDERSON, WILLIAMS & FAGG.

Record p. 17. *Attorneys for Plaintiffs.*

On the sixth day of March 1876, the cause was continued. (Rec. p. 18.)

The motion to remand was not made until April 15th, 1876, after the adjournment of the November term 1875.

By appearing and moving to set down the cause for hearing on its merits, plaintiffs submitted themselves to the jurisdiction of the Federal court, and waived the objection that the petition for removal was not filed in time.

Dillon on Removal of causes, pp. 59, 60.
French *vs.* Hay, 22 Wall. 244.

It is also objected that there is no affidavit of the appellant. The affidavit was made by the agent and attorney of appellant.

When this court decided that corporations were to be classed as citizens and allowed to enjoy the right of removal, that decision necessarily implied that an agent can make the affidavit, when one was required, otherwise there could be no removal, as a corporation can only act through its agents.

In this case, the affiant was perhaps the only one who had personal knowledge of the facts, and could affirm to them. No other agent of the corporation was probably ever in the county of Macon, Mo.

Dillon on Removal, p. 61–2 and notes.

The statute does not require the State court to approve the bond. It only provides that it shall accept the petition and bond, and proceed no further. No order for removal is required. The petition and bond appear as parts of the record, and no objection appears to have been made below.

Gaines *vs.* Fuentes, 2 Otto, 10.

Appellant respectfully submits that the circuit court erred in remanding this cause, and that a construction of the acts of Congress upon which it relies to sustain its right to a removal, in the liberal spirit in which they have been passed, and which the recent decisions of this court, touching this important subject, have construed in the same spirit, will give to it an impartial trial in an unbiased court, free from the local influence and prejudice that have so long operated to deprive it of its rights.

Appellant begs leave to refer to the following cases decided in the circuit court as bearing upon the questions involved in this case.

Girardy *vs.* Moore in the circuit court southern district of Georgia, decided by Justice Bradley, found in *Cent. Law Journal*, vol. 5, p. 78.

Also Board of Commissioners *vs.* Kansas P. R. R. Co. decided by Justice Miller, vol. 5. *Cent. Law Joural*, p. 102.

All of which is respectfully submitted.

GEO. P. STRONG,
Attorney and of Counsel for Appellant.

SUPREME COURT

OF THE

UNITED STATES.

PHILADELPHIA BAR ASSOCIATION

THE AMERICAN BIBLE SOCIETY, Plaintiff in Error,

vs.

JOHN A. GROVE, J. H. BROWNE, E. A. BROWNE, et al.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Brief for Defendants in Error.

Belmont Chronicle Book and Job Rooms, St. Clairsville, Ohio.

SUPREME COURT OF THE UNITED STATES.

THE AMERICAN BIBLE SOCIETY, *Plaintiff in Error*,

vs.

JOHN A. GROVE, J. H. BROWNE, E. A. BROWNE, et al.

In Error to the Circuit Court of the United States for the Western District of Missouri.

BRIEF FOR DEFENDANTS IN ERROR.

This suit was brought March 6, 1868, in the common pleas court of Hannibal, Marion county, Missouri, on petition (amended June 13, 1868) of John A. Grove, sen., et al. against Wm. Booker, et al. to set aside the will of Jacob E. Grove, of that county, deceased. The plaintiffs are heirs at law of the decedent, and the American Bible Society, a defendant, is named as a legatee in the will, and the other defendants are heirs at law or legatees or devisees.

The defendants, on September 1, 1868, filed their joint answer, denying the grounds set forth in the amended petition.

The cause was afterward removed to the common pleas court of Louisiana, Pike county, and thence again to the circuit court of Macon county, and four trials were had, the last at the January adjourned term of said circuit court in April, 1875, the jury disagreeing, except at the second trial, which was in the circuit court, at the January term, 1874, when they returned a verdict for the plaintiffs, upon which the court adjudged the will to be null and void; and afterward, on motion of the defendants, set aside the judgment and granted a new trial.

The next regular term, after the last trial, commenced

the third Monday of May, 1875, when the case was continued.

The plaintiff in error, the American Bible Society, on September 21, 1875, filed its petition, etc. for removal of the cause to the circuit court of the United States for the Western District of Missouri, and the papers being filed therein, and the case set for hearing, the plaintiffs, on April 15, 1876, filed their motion to remand the case to the state court. On hearing the motion, April 17, 1876, the court sustained it and ordered the case to be remanded, to which the American Bible Society excepted and prayed for an appeal. Whereupon this cause came into this court. All of which appears in the printed record of this case.

IS IT A CASE FOR REMOVAL?

To be such, there must be a controversy which is wholly between citizens of different states (2nd Sec. Stat., approved March 3, 1875; chap. 137, 2nd sess. 43d Congress). The petition for removal (printed record, p. 15) assumes that the petitioner is the sole party defendant to the controversy, which assumption is inconsistent with the pleadings, because all the defendants make the same answer and stand in the same relation to the issue. If any one of the defendants is a citizen of the same state with any of the plaintiffs, then the controversy is not wholly between citizens of different states. The petition for removal should show the contrary, which it does not, except upon the assumption that the petitioner is the sole party defendant to the controversy. But it shows that some of the plaintiffs are of the state of Ohio, and the pleadings name one of the defendants as "the Sunday School of the First Presbyterian Church of St. Clairsville, Ohio," which carries with it the idea that Ohio is its location. (Title to amended petition, printed record, p. 5.)

The first reason assigned in the motion to remand is, "Because the petition for the removal of this cause from the state court to the circuit court of the United States was not filed before or at the term at which said cause could be first tried, nor before the trial thereof." (Printed record, p. 18.)

The petition for removal was filed September 21, 1875, in the state court. There was a regular term of that court, commencing the third Monday of May, 1875, at which the cause was continued. The case had been pending from March 6, 1868, and the issues were made up September 1, of that year; so that the case could have been tried at the term of May, 1875, and before that of September at which the application was made. Statutes of Missouri provide: "In the Judicial Circuits, herein specified, the courts shall be held at the following designated times in each county, respectively, in each year." (Wagner's Missouri Statutes, 1872, p. 433: § 37.) "In the twenty-seventh Judicial Circuit, in the county of Macon, on the fourth Monday in January, the second Monday in May, and first Monday in September." (Id., p. 437.) The record shows that the filing of the petition was after the term at which the cause could have been first tried, even if the statute should be held to mean the first term beginning after the said statute went into force, on March 3, 1875. But the cause could have been tried at the preceding term, and the fact is, as shown by the record, that it was actually tried in April, 1875, at a term which commenced in the preceding January, which was, in fact, the first term at which it could have been tried after the act was passed.

Further: the filing must, by the statute, have been BEFORE the trial. It was not, as the record shows. (Sec. 3 of the act of Congress above referred to.)

The second reason in the motion to remand is: "Because the petition does not state that plaintiffs, or either of them, are now or ever were citizens of the state of Missouri."

The object of this ground was to meet the petitioner's ground for removal, that, from prejudice and local influence, the petitioner would not be able to obtain justice in the state court.

The statute last above referred to does not contain any provision for removal upon such ground; but, it would seem, that it was intended to provide for every case in which a removal could be had of a cause like this, and

repeals all acts and parts of acts in conflict with its provisions. But if it be held that the repeal is not an express one, and, because repeals by implication are not favored, that the act approved March 2, 1867, p. 559, U. S. Stat. at large, vol. 14, and revised in sec. 639, p. 114, revised Stat. of the U. S. is still in force, yet a case for removal is not made, for it does not any where appear, either in the petition or elsewhere in the record, that any of the plaintiffs is a citizen of the state of Missouri, in which the suit was brought. On the contrary, the fact is implied that they were non-residents, because, by the laws of Missouri, the plaintiff, if non-resident of the state, is required to secure costs, and security was given in this case. (Printed record, p. 9.)

Wagner's Missouri Stat., 1872, p. 341: § 1, provides, that, "In all civil cases where the plaintiff, or person for whose use action is to be commenced, shall not be a resident of this state, the plaintiff, or person for whose use the action is to be commenced, shall, before he institutes such suit, file with the clerk of the court, in which the action is to be commenced, the written undertaking of some person being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, the court, on motion, may dismiss the same, unless such undertaking be filed before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing thereon."

The third reason assigned in the motion to remand is: "Because there is no affidavit to the petition for removal."

The affidavit (record pp. 15–16) is made by George P. Strong, and shows on its face that he is but the agent or attorney of the American Bible Society. The U. S. Statute last above referred to requires that the PARTY make the affidavit, which was not done. A party cannot, in the nature of things, make an affidavit by agent nor attorney.

The fourth and last reason of the motion to remand is: "Because there has been no order of the Macon circuit court for the removal of this cause from its jurisdiction." Section 3 of the U. S. Statute, of 1875, makes it the duty

of the state court to accept the petition and bond, and proceed no further in the suit. It does not appear any where in the record that the petition or bond was accepted, or presented to the court for acceptance; nor that the court made an order in the premises. There is no indorsement of acceptance upon the petition or bond. The question is submitted to the court whether such acts were not necessary, and should not be evidenced by the record.

NOTE.—In preparing this brief (at St. Clairsville, Ohio,) some errors in the printed record, especially in names of parties, have been discovered, which are regarded as immaterial; and it is believed to be unnecessary to delay for an inspection of the original record and correction of the errors.

L. DANFORD,
Of counsel for defendants in error.